

ESA

The convoluted ESA process had begun some time earlier with a draft Biological Assessment ("BS") prepared by Midvale's consultant and submitted to the USFS in March of 1993.⁴¹ The USFS might have chosen simply to process the application for this environmentally benign project, seeking informal concurrence from NMFS that the project was not likely to adversely affect endangered species. Instead the USFS chose to split the project into two parts and combine it with two watershed level BAs containing many other projects; one for the Main Stem Salmon and one for the South Fork.

This resulted in NMFS elevating the process to require full blown Biological Opinions ("BO"). Because this would be a lengthy process, NMFS responded to urging from Midvale by removing the component of the Midvale Project included in the South Fork BO, and inserting it into this Main Stem BO. This was done because the Main Stem BO was further advanced in the regulatory process.

Later, the USFS persuaded that the Midvale Project could be broken off entirely from both BOs, and undergo separate informal consultation leading to concurrence (without preparation of a BO on Midvale's project).

Then, as a result of the fallout from the *PRC v. Thomas, II* litigation," NMFS undertook a "screening" process with the USFS. The purpose of this screening process was to re-evaluate those projects which could move forward on an expedited, informal level. Most of the projects included in the two watershed BOs (including the Midvale Project) passed muster and were preliminarily approved for concurrence as of March 10, 1995. Inexplicably, however, NMFS failed to act on this for over a month and a half (until April 26, 1995)—despite frequent assurances from NMFS staff that nothing remained to be done and that official action was imminent. During this time, Midvale was unable to make critical commitments necessary to allow the project to move forward.

As of this date, the USFS has received NMFS's concurrence, and the USFS is expected to issue the special use permit shortly. If that occurs, Midvale will be able to begin construction this summer, but at a substantially higher cost due to the company's inability to secure materials and labor with sufficient lead times.

Summary of Appendix

A separate appendix to this Regulatory Chronicle contains selected communications from Midvale's lawyers and consultants to the USFS and NMFS. A few internal Midvale memoranda which document particular regulatory actions are included, as well. (Many other documents are not included here, because they contain collateral redundant or privileged information, or are simply too bulky.)

These communications document three things: First, Midvale has made every effort to comply with regulations, to cooperate with the agencies, and to accommodate each of their concerns. Second,

⁴¹Even this much procedure is not required under the **ESA**. **Bas** are required only when an Environmental Impact Statement is prepared. 50 C.F.R. §402.12(b), and none was for this project.

⁴²On January 12, 1995, the U.S. District Court in Idaho issued a remarkably broad injunction which prohibited all ongoing, announced and proposed logging, mining, grazing and road construction within six national forests in Idaho until the Forest Service completed endangered species consultation on its Land and Resource Management **Plans** ("LRMPs"). The injunction later **was** lifted, but issues in the case have not yet fully been resolved.

Midvale consistently made the agencies aware of Midvale's own deadlines and time constraints, and the importance of timely regulatory action. Third, in virtually every instance of delay, the federal agencies failed to notify the applicant of the delay, much less to explain the circumstances and offer revised assessments of what to expect next. Consequently, after nearly two years of delay and with the 1994 construction season fast approaching, Midvale was pushed to the additional expense of retaining counsel to monitor this unseemly regulatory process and to prod the agencies along through each remaining step of the process.

It is Midvale's view that the agencies' shortcomings cannot fairly be blamed on the staff-level members of these bureaucracies. Indeed, the correspondence in the Appendix documents many instances of agency staffers who, too, were frustrated by the sluggish pace of events, and who worked long and hard to assist Midvale in navigating this regulatory maze. The bottom line, however, is that despite the good efforts of these individuals, the process has not worked.

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CHRONOLOGY OF USFS AND NMFS ACTIONS

<u>Date</u>	<u>Event or Document</u>
June 18, 1992.....	Idaho PUC issued Certificate of Public Convenience and Necessity to Midvale authorizing it to extend service to Burgdorf, Secesh. Warren & South Fork Salmon River Areas.
August 12, 1993.....	Midvale files special use application with USFS,
March 12, 1993.....	Midvale prepared draft BA. <i>Notes: Rather than following the draft prepared by Midvale, LSFS incorporated discussion from Midvale's draft BA into two separate comprehensive Marershd Bas. (1) Main Salmon. (2) South Fork of the Salmon</i>
June 1993.....	Midvale prepared draft EA.
January 34, 1994.....	USFS letter to NMFS. <i>Notes: Transmits Main Salmon BA. including part of Midvale project</i>
March 22, 1994.....	Draft Biological Opinion (terms and conditions). <i>Notes: Prepared by NMFS in response to Main Salmon BA.</i>
April 12, 1994.....	PRC v. Thomas, II filed. <i>Notes: Two environmental groups Pacific Rivers Council and the Wilderness Society brought suit against the USFS for failure to consult with the NMFS with respect to endangered salmon. This case was modeled on a similar successful case brought by the same environmental groups (and three others) in Oregon.</i>
April 15, 1994.....	C. Meyer (Midvale) memo to L. Williams (Midvale). <i>Notes: Main Salmon BA on faster track: was approved by SFGS and sent to NMFS some time ago. South Fork BA still waiting approval on 4/15/94. Expected to be completed by the following Monday. Expect NMFS to decline to concur in the two Bas and prepare BOS instead. That should take 20 days following submission of South Fork BA (Short time frame, because NMFS is already working on it.)</i>
April 15, 1994.....	C. Meyer (Midvale) letter to L. Williams (Midvale). <i>Notes: Anticipate NMFS approval of BA or BO by June 1994. and USFS permit by July 1994.</i>
April 19, 1994.....	R. Joslin (USFS) letter to M. Tuttle (NMFS).

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April 19, 1994.....

Event or Document

R. Joslin (USFS) letter to M. Tuttle (NMFS).

May 16, 1994.....

C. Meyers (Midvale) memo to L. Williams (Midvale).

Notes: Learned that the USFS has decided to re-write the draft EA submitted by Midvale, despite the fact that this draft has been on the USFS's desk for a while. Begin discussion of whether the USFS will waive the 45 day appeal period if no adverse comments are received. NMFS has agreed to take Midvale component out of South Fork BA and put it in with Main salmon BA.

June 8, 1994.....

C. Meyer (Midvale) conference with R. Strach (NMFS).

Norcs: NMFS aiming at completion date of no later than The July 15, 1994

June 8, 1994.....

C. Meyer (Midvale) letter to L. Williams (Midvale).

Notes: USFS still working on revised EA. USFS determines that it can proceed to finalize EA while NMFS completes BO. NMFS still working on BO: expected on June 1, but didn't arrive. NMFS assures that BO can be finished and approved at all levels by July 15, 1994.

June 13, 1994.....

D. Alexander (USFS) letter to Interested Party.

Norcs: USFS releases June 1994 EA for public comment through July 15, 1994.

June 16, 1994.....

C. Meyer (Midvale).

Notes: If no adverse comments. USFS should be able to approve by end of July 1994. NMFS says they are still on track.

June 20, 1994.....

C. Meyer (Midvale) letter to A. Nelson; C. Meyer letter to R. Strach (NMFS).

Norcs: Begin discussion of possibility of issuing permit for portion of project. if SHPO approval cannot be approved for Town of Warren.

June 27, 1994.....

D. Caner (NMFS) letter to L. Jacobson (USFS).

Notes: Requested information on six issues regarding possible project reconfiguration if only a partial permit is granted. This was identified as the information needed to complete the Biological Opinion.

June 28, 1994.....

C. Meyer (Midvale) letter to L. Fitch (USFS).

Notes: Further clarification of Midvale's proposed partial project and attendant re-configuration.

July 14, 1994.....

C. Meyer (Midvale) conference with R. Strach (NMFS).

Norcs: Some slippage in BO, but assured that BO will be completed between July 30 and August 15, 1994.

<u>Date</u>	<u>Event or Document</u>
July 15, 1994.....	End of comment period. <i>Notes: Several comments were received. The LSFS deems a few of them to be "adverse" although none raise substantial issues. (E.g., "We don't want any damn telephones in here.")</i>
July 22, 1994.....	C. Meyer (Midvale) letter to D. Alexander (USFS). <i>Notes: Notes slippage with NMFS. Now USFS not expected to give final permit until early September 1994. Notify the USFS of Midvale's plans to proceed with non-federal components.</i>
July 25, 1994.....	C. Meyer (Midvale) letter to D. Alexander (USFS). <i>Notes: Formal request for copy of draft BO prepared by NMFS.</i>
July 25, 1994.....	C. Meyer (Midvale) memo to L. Williams (Midvale). <i>Notes: Thirty forest fires started over the weekend. This will delay LSFS review of the draft BO.</i>
July 26, 1994.....	C. Meyer (Midvale) letter to D. Alexander (USFS). <i>Notes: Request that the USFS take one of two actions: (1) determine that no appealable issues were raised by the comments received, and proceed with final action at once, without appeal period. (2) Issue decision and begin appeal period now, without waiting for NMFS to complete BO. subject to receipt of final BO.</i>
August 2, 1994.....	C. Meyer (Midvale) letter to L. Fitch (USFS); K. Weyers (Midvale) memo to C. Meyer. <i>Notes: Responses prepared by K. Weyers to each of the comments received.</i>
August 2, 1994.....	C. Meyer (Midvale) memo to L. Williams (Midvale). <i>Notes: Discussions with USFS indicate preliminary willingness to start the appeal clock running, without waiting for final BO. No word yet on how NMFS is doing on the BO.</i>
August 8, 1994.....	C. Meyer (Midvale) conference with R. Strach (NMFS). <i>Notes: Additional slippage on BO, but should be complete by early September 1994.</i>
August 10, 1994.....	C. Meyer (Midvale) letter to D. Alexander and L. Fitch (USFS). <i>Notes: It appears that nothing remains to be done except to issue the final decision. Again, urge USFS to move in order to begin appeal clock running. Request permit for Burgdorf and Secesh Meadows only. NMFS staff assures Midvale that BO will be issued within three weeks.</i>
August 12, 1994.....	C. Meyer (Midvale) letter to C. Spalding (USFS). <i>Notes: Notes that C. Spalding has been detailed to put out final decision document.</i>

<u>Date</u>	<u>Event or Document</u>
August 17, 1994.....	L. Fitch (USFS) letter to C. Meyer (Midvale). <i>Notes: Confirms that the USFS has no jurisdiction over private land, but that development on private land is still subject to consultation.</i>
August 22, 1994.....	DRAFT C. Meyer (Midvale) letter to D. Alexander and L. Fitch (USFS); phone conference w/ L. Fitch <i>Notes: Decision still not out. C. Spalding now on leave; not due back until August 29, 1994. L. Fitch says that issuance is imminent.</i>
August 29, 1994.....	USFS Decision Notice and FONSI. <i>Notes: Legal notice of the decision was set to run in the Idaho Statesman on the following day. For some reason it doesn't. Ms. Fitch (USFS) then reverses the action and retracts the decision. I am told that this retraction was taken in response to concerns raised by a staff level biologist who raised questions about the propriety of the conditional approval given to the project.</i>
September 2, 1994.....	C. Meyer (Midvale) letter to D. Alexander and L. Fitch (USFS). <i>Notes: Protest decision to retract decision. Notes that C. Meyer (Midvale) contacted General Counsel office in Ogden, which confirmed appropriateness of proceeding on conditional approval.</i>
September 1994.....	Final Environmental Assessment for Midvale project.
September 7, 1994.....	D. Alexander (USFS) memo to Interested Party: Decision Notice and FONSI on Midvale project. <i>Notes: The USFS finally issues conditional approval of the project, conditioned upon successful completion of consultation with NMFS. This action by the USFS came just over two years after the application for special use permit was filed by Midvale. This action, in turn, triggers a 45 day appeal period, due to the filing of "adverse" comments.</i>
September 16, 1994.....	C. Meyer (Midvale) memo to L. Williams (Midvale) <i>Notes: Appeal period to end October 15, 1994. Final permit could issue as early as October 31, 1994.</i>
October 14, 1994.....	C. Meyer (Midvale) letter to D. Carter (NMFS). <i>Notes: Inquire as to status of BO. Advise that time is of the essence</i>
October 25, 1994.....	Appeal period ends.
October 26, 1994.....	C. Meyer (Midvale) letter to L. Fitch (USFS). <i>Notes: Note that NMFS has missed deadline for BO.</i>

Date	Event or Document
November 18, 1994.....	D. Bums (USFS)e-mail. <i>Notes: Notes that NMFS has agreed to break Midvale project out from the two B.As NMFS requests that the USFS send NMFS a letter requesting this action.</i>
December 7, 1994.....	D. Alexander (USFS) letter to B. Brown(NMFS). <i>Notes: Requests that Midvale project be taken out of the Main Salmon and South Fork B.As. and handled separately in order to expedite. Notes that NMFS has prepared a draft letter concurring with the USFS's determination that project is 'not likely to adversely affect.' Requests informal concurrence..</i>
January 12, 1995.....	Decision in <i>PRC v Thomas, II</i> . <i>Notes: Judge Ezra ruled in favor of the environmental groups and entered an order granting broad injunctive relief. The injunction did not include cable plowing activities. However, the injunction had the effect of causing both USFS and NMFS to allocate manpower to deal with the injunction's requirement that a programmatic Biological Opinion be prepared on all LRMPs in Idaho. Judge Ezra provided only one escape hatch: He said that the USFS may conduct evaluations of individual projects deemed "not likely to adversely affect" the species under section 7(d) of the ESA. in order to determine whether they will constitute "an irreversible or irretrievable commitment of resources" in violation of the Act. The judge said he would then entertain motions to except projects passing muster under the 7(d) standard. This triggered a "screening process" in an effort to identify those projects which could proceed. The agencies processed Midvale's application under this screen, even though it was not subject to the injunction.</i>
February 14, 1995.....	C. Meyer (Midvale) letter to D. Carter (NMFS). <i>Notes: Notes that the USFS has split off Midvale project from the two watershed BOs in order to facilitate process. The USFS has determined that the project is "not likely to adversely affect." Awaiting NMFS's concurrence. concurrence effort being slowed by workload shifts in response to <i>PRC v. Thomas, II</i>. Midvale advised that it needs decision by mid March, 1995.</i>
February 27, 1995.....	C. Meyer (Midvale) letter to D. Carter (NMFS). <i>Notes: D. Correr expects to complete her review by the end of the week, and that further signoffs will follow</i>
March 1, 1995.....	Biological Opinion on the LRMPs. <i>Notes: This grew out of the <i>PRC v. Thomas, II</i> litigation</i>
March 3, 1995.....	L. Fitch (USFS) letter to K. Weyers (Midvale). <i>Notes: Requests information on five issues identified by NMFS</i>

<u>Date</u>	<u>Event or Document</u>
March 6, 1995.....	K. Weyers (Midvale) letter to L. Fitch (USFS). <i>Notes: Provides responses to five issues identified by NMFS.</i>
March 8, 1995.....	Injunction lifted in PRC v. Thomas, II
March 10, 1995.....	Adverse Effects Determination <i>Notes: D. Burns (USFS) signs "Adverse Effects Determination concluding that Midvale is "not likely to adversely affect" species. This is part of the "screenprocess" resulting from the decision in PRC v. Thomas. II.</i>
March 14, 1995.....	D. Alexander (USFS) letter to J. Wyland (NMFS). <i>Notes: Screen completed. Midvale passes.</i>
March 14, 1995.....	C. Meyer (Midvale) letter to D. Carter (NMFS). <i>Notes: Request for progress report.</i>
March 21, 1995.....	C. Meyer (Midvale) letter to L. Fitch (USFS). <i>Notes: Learned that Midvale passed muster under screening pursuant to PRC v. Thomas. II. Boise office of NMFS has prepared a draft concurrence letter. Ask if there is anything else the USFS needs from Midvale.</i>
March 21, 1995.....	C. Meyer (Midvale) letter to D. Carter (NMFS) <i>Notes: Time is of the essence.</i>
March 26, 1995.....	Deadline for completion of "screening." <i>Notes: This deadline derives from the March 1, 1995 Biological Opinion on the LRMPs.</i>
April 6, 1995.....	C. Meyer (Midvale) letter to D. Carter (NMFS). <i>Notes: Still no news.</i>
April 24, 1995.....	U.S. Supreme Court denies certiorari in PRC v. Thomas, I . <i>Notes: This essentially locks in the decision in PRC v. Thomas. II.</i>
April 26, 1995.....	W. Stelle (NMFS) letter to D. Bosworth (USFS). <i>Notes: NMFS concurs in finding that the Midvale project is not likely to adversely affect endangered species.</i>

●APPENDIX●

THE MIDVALE TELEPHONE PROJECT

A REGULATORY CHRONICLE OF THE EFFORT TO BRING TELEPHONE SERVICE TO THE CENTRAL IDAHO COMMUNITIES OF BURGDORF, SECESH MEADOWS, WARREN AND SOUTH FORK SALMON RIVER

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May 3, 1995

INDEX TO APPENDIX

This appendix contains copies of correspondence from Midvale's counsel and consultants to the SFS and NMFS. The correspondence is summarized in the table below.

Selected Correspondence From Midvale to USFS and NMFS		
DATE	TO	MATTER/SUBJECT
1. 4/15/94	Lane R. Williams	Endangered Species Act Compliance Procedures & Timetables.
2. 5/17/94	Allison Nelson	Explore 45 day delay issue.
3. 5/23/94 (replacing 5/18/94 Letter)	Curtis Spalding	Confirm understanding with respect to 45 day delay issue & definition of "adverse" comments.
4. 6/17/94	David F. Alexander	Environmental Assessment was made available for public comment on 6/13/94; comment period to run through 7/15/94; narrow window available for construction to begin this summer.
5. 6/20/94	Alison Nelson	Confirmation of telephone conversation re: comments not received to date except for SHPO; SHPO approval.
6. 6/20/94	Russ Strach	SHPO approval and contingency plan to shorten the project.
7. 6/27/94	Curtis Spalding	Discussion re: authority of the USFS to regulate non-federal lands. Enclosure: Informal research notes on this subject.
8. 6/28/94	Linda L. Fitch	Respond to USFS questions about configuration changes required in connection with partial permit approval. (Partial permit approval may be necessary if SHPO approval not timely secured.)
9. 7/22/94	David F. Alexander	Notice to the USFS of Midvale's intent to proceed with project components on non-federal lands.
10. 7/25/94	David F. Alexander	Formal request for copy of Draft Biological Opinion, which the USFS and NMFS declined to make available to Midvale.
11. 7/26/94	David F. Alexander	Slippage in the timetable for final action; request for action.

12. 8/2/94	Linda L. Fitch	Midvale's response to public comments received on the project.
13. 8/2/94	Lane R. Williams	Report on telephone conference with Linda Fitch; Request for immediate issuance of decision.
14. 8/10/94	David F. Alexander Linda L. Fitch	Request for immediate issuance of decision.
15. 8/12/94	Curtis Spalding	Request for immediate issuance of decision.
16. 8/22/94	David F. Alexander Linda L. Fitch	Letter not sent. included here because it recites facts; Still no action taken; request for prompt action.
17. 8/30/94	Lane R. Williams	Documents further delays
18. 8/30/94	Lane R. Williams	Documents issuance of permit decision(which was later revoked.)
19. 9/2/94	David F. Alexander Linda L. Fitch	Protest revocation of permit decision: assert legal propriety of conditional approval: request for prompt action.
20. 10/14/94	Deb Carter	Reminder that USFS appeal period will end on 10/25/94; request status of Biological Opinion: urge prompt action.
21. 10/26/94	Linda L. Fitch	Note that appeal period ended yesterday; request confirmation that no appeals were filed: note that NMFS has failed to complete Biological Opinion.
22. 10/26/94	Russ Strach	Note that NMFS had 135 days under the regulations to complete the Biological Opinion. and that Biological Opinion was expected on 6/1/94; documents repeated slippage: request status of Biological Opinion.
23. 2/14/95	Deb Carter	Note that USFS has determined that the project is "not likely to adversely affect" and that NMFS has 30 days to respond. Emphasize importance of decision by 3/15/95.
24. 2/27/95	Deb Carter	Explain source of 30 day rule; request high priority attention to concurrence.
25. 3/6/95	Linda L. Fitch	Follow up on telephone conference which indicated that NMFS had some remaining concerns about the project.
26. 3/14/95	Deb Carter	Request for status of concurrence.

27. 3/21/95	Linda L. Fitch	Advise as to NMFS delays: inquire as to whether all the USFS's information needs have been satisfied.
28. 3/21/95	Deb Carter	Note that screening is completed: further NMFS deadlines have been missed and time is of the essence: ask if any additional information is required.
29. 4/6/95	Deb Carter	Still no action on concurrence: request for prompt attention.
30 4/25/95	Deb Carter	il t for ti on status of consultation

ATTACHMENT B - RATES BY STATE

ALABAMA	ALL COUNTIES	\$29.69	\$25.96
ARKANSAS	ALL COUNTIES	\$33.23	\$19.48
ARIZONA	APACHE	\$ 7.40	\$ 6.47
	COCHISE		
	COCONINO, (North of the Colorado River)		
	GILA		
	GRAHAM		
	LAPAZ		
	MOHAVE		
	NAVAJO		
	PIMA		
	YAVAPAI		
	W M A		
	COCONINO, (South of the Colorado River)	\$29.69	\$25.96
	GREENLEE		
	MARICOPA		
	PINAL		
	SANTA CRUZ		
CALIFORNIA	IMPERIAL	\$ 14.85	\$12.98
	INYO		
	LASSEN		
	MODOC		
	RIVERSIDE		
	SAN BERNARDINO		
	SISKIYOU	\$22.23	\$19.48
	ALAMEDA	\$37.08	\$32.45
	ALPINE		
	AMADOR		
	BUTTE		
	CALAVERAS		
	COLUSA		
	CONTRA COSTA		
	DEL NORTE		
	EL DORADO		
	FRESNO		
	GLENN		
	HUMBOLT		

CALIFORNIA (Cont'd)

KERN
KINGS
LAKE
MADERA
MARIPOSA
MENDOCINO
MERCED
MONO
NAPA
NEVADA
PLACER
PLUMAS
SACRAMENTO
SAN BENITO
SAN JOAQUIN
SANTA CLARA
SHASTA
SIERRA
SOLANO
SONOMA
STANISLAUS
SUTTER
TEHAMA
TRINITY
TULARE
TUOLUMNE
YOLO
W B A
LOS ANGELES
MARIN
MONTEREY
ORANGE
SAN DIEGO
SAN FRANCISCO
SAN LUIS OBISPO
SAN MATEO
SANTA BARBARA
SANTA CRUZ
VENTURA

\$37.08 \$32.45

\$44.50 \$38.96

COLORADO

ADAMS
ARAPAHOE
CHEYENNE
CROWLEY

\$7.30 \$6.47

COLORADO (Cont'd)

EL PASO		
ELBERT		
HUERFANO		
KIOWA		
KIT CARSON		
LINCOLN		
LOGAN	\$7.30	\$6.47
MOFFAT		
MONTEZUMA		
MORGAN		
PHILLIPS		
PUEBLO		
SEDFEWICK		
WASHINGTON		
WELD		
YUMA		
BACA	\$14.85	\$12.98
DOLORES		
GARFIELD		
LAS ANIMAS		
MESA		
MONTROSE		
OTERO		
PROWERS		
RIO BLANCO		
ROUTT		
SAN MIGUEL		
ALAMOSA	\$29.69	\$25.96
ARCHULETA		
BOULDER		
CHAFFEE		
CLEAR CREEK		
CONEJOS		
COSTILLA		
CUSTER		
DELTA		
DENVER	\$29.69	\$25.96
DOUGLAS		
EAGLE		
FREMONT		
GILPM		
GRAND		
GUNNISON		

COLORADO (Cont'd)

JACKSON
JEFFERSON
LaPLATA
LAKE
LARIMER
MINERAL
OURAY
PARK
PITKIN
RIO GRANDE
SAGUACHE
SAN JUAN
SUMMIT
TELLER

CONNECTICUT**DELAWARE****FLORIDA**

ALL COUNTIES

\$ 7.40

\$ 6.47

ALL COUNTIES

\$ 7.40

\$ 6.41

BAKER

\$44.50

\$38.96

BAY

BRADFORD

CALHOUN

CLAY

COLUMBIA

\$44.50

\$38.96

DIXIE

DUVAL

ESCAMBIA

FRANKLIN

GADSDEN

GILCHRIST

GULF

HAMILTON

HOLMES

JACKSON

JEFFERSON

LAFAYETTE

LEON

LIBERTY

MADISON

NASSAU

OKALOOSA

SANTA ROSA

SUWANNEE

TAYLOR

UNION

FLORIDA (Cont'd)	WAKULLA		
	WALTON		
	WASHINGTON		
	ALL OTHER COUNTIES	\$71.17	\$64.90
GEORGIA	ALL COUNTIES	\$44.50	\$38.96
IDAHO	CASSIA	\$ 7.40	\$ 6.47
	GOODING		
	JEROME		
	LINCOLN		
	MINIDOKA		
	ONEIDA		
	OWYHEE		
	POWER		
	TWIN FALLS		
	ADA	\$22.23	\$19.48
	ADAMS		
	BANNOCK		
	BEAR LAKE		
	BENEWAH		
	BINGHAM		
	BLAINE		
	BOISE		
	BONNER		
	BONNEVILLE		
	BOUNDARY		
	BUTTE		
	CAMAS		
	CANYON		
	CARIBOU		
	CLARK		
	CLEARWATER		
	CUSTER		
	ELMORE		
	FRANKLIN		
	FREMONT		
	GEM		

IDAHO (Cont'd)	IDAHO JEFFERSON KOOTENAI LATAH LEMHI LEWIS MADISON NEZ PERCE PAYETTE SHOSHONE TETON VALLEY WASHINGTON	\$22.23	\$19.48
ILLINOIS	ALL COUNTIES	\$22.23	\$19.48
INDIANA	ALL COUNTIES	\$37.08	\$32.45
IOWA	ALL COUNTIES	\$32.23	\$19.48
KANSAS	MORTON	\$14.85	\$12.98
	ALL OTHER COUNTIES	\$ 7.40	\$ 6.47
KENTUCKY	ALL COUNTIES	\$22.23	\$19.48
LOUISIANA	ALL COUNTIES	\$44.50	\$38.96
MAINE	ALL COUNTIES	\$22.23	\$19.48
MARYLAND	ALL COUNTIES	\$ 7.40	\$6.47
MASSACHUSETTS	ALL COUNTIES	\$ 7.40	\$ 6.41
MICHIGAN	ALGER BARAGA CHIPPEWA DELTA DICKERSON GOGEBIC HOUGHTON IRON KEWEENAW LUCE MACKINAC MARQUETTE	\$22.23 \$ 7.40 \$ 7.40 \$ 7.40 \$ 7.40 \$ 7.40 \$ 7.40 \$ 7.40 \$ 7.40 \$ 7.40 \$ 7.40 \$ 7.40 \$ 7.40	\$19.48 \$ 6.47 \$ 6.47 \$ 6.47 \$ 6.47 \$ 6.47 \$ 6.47 \$ 6.47 \$ 6.47 \$ 6.47 \$ 6.47 \$ 6.47 \$ 6.47

MICHIGAN (Contd.)	MENOMINEE		
	ONTONAGON		
	SCHOOLCRAFT		
	ALL OTHER COUNTIES	\$29.69	\$25.96
MINNESOTA	ALL COUNTIES	\$22.23	\$19.48
MISSISSIPPI	ALL COUNTIES	\$29.69	\$25.96
MISSOURI	ALL COUNTIES	\$22.23	\$19.48
MONTANA	BIG HORN	\$ 7.40	\$ 6.47
	BLAINE		
	CARTER		
	CASCADE		
	CHOUTEAU		
	CUSTER		
	DANIELS	\$7.40	\$6.17
	DAWSON		
	FALLON		
	FERGUS		
	GARFIELD		
	GLACIER		
	GOLDEN VALLEY		
	HILL		
	JUDITH BASIN		
	LIBERTY		
	MCCONE		
	MEAGHER		
	MUSSELSHELL		
	PETROLEUM		
	PHILLIPS		
	PONDERA		
	POWDER RIVER		
	PRAIRIE		
	RICHLAND		
	ROOSEVELT		
	ROSEBUD		
	SHERIDAN		
	TETON		
	TOOLE		
	TREASURE		
	VALLEY		
	WHEATLAND		
	WIBAUX		

MONTANA (Cont'd)	YELLOWSTONE		
	BEAVERHEAD	\$33.23	\$19.18
	BROADWATER		
	CARBON	\$23.33	\$19.48
	DEER LODGE		
	FLATHEAD		
	GALLATIN		
	GRANITE		
	JEFFERSON		
	LAKE		
	LEWIS AND CLARK		
	LINCOLN		
	MADISON		
	MINERAL		
	MISSOULA		
	PARK		
	POWELL		
	RAVALLI		
	SANDERS		
	SILVER BOW		
	STILLWATER		
	SWEET GRASS		
NEBRASKA	ALL COUNTIES	\$ 7.40	\$ 6.47
NEVADA	CHURCHILL	\$ 3.71	\$ 3.24
	CLARK		
	ELKO		
	ESMERALDA		
	EUREKA		
	HUMBOLT		
	LANDER		
	LINCOLN		
	LYON		
	MINERAL		
	NYE	\$ 3.71	\$ 3.24
	PERSHING		
	WASHOE		
	WHITE PINE		
	CARSON CITY	\$37.08	\$32.45
	DOUGLAS		
	STORY		
NEW HAMPSHIRE	ALL COUNTIES	\$22.23	\$19.48

NEW JERSEY	ALL COUNTIES	\$ 7.10	\$ 6.17
NEB 'MEXICO	CHAVES	\$ 7.10	\$ 6.17
	CURRY		
	DE BACA		
	DONA ANA		
	EDDY		
	GRANT		
	GUADALUPE		
	HARDING		
	HIDALGO		
	LEA		
	LUNA		
	McKINLEY		
	OTERO		
	QUAY		
	ROOSEVELT		
	SAN JUAN		
	SOCORRO		
	TORRENCE		
	RIO ARriba	\$14.85	\$12.98
	SANDOVAL		
	UNION		
	BERNALILLO	\$29.69	\$25.96
	CATRON		
	CIBOLA		
	COLFAX		
	LINCOLN		
	LOS ALAMOS		
	MORA		
	SAN MIGUEL		
	SANTA FE		
	SIERRA		
	TAOS		
	VALENCIA		
NEW' YORK	ALL COUNTIES	\$29.69	\$25.96
NORTH CAROLINA	ALL COUNTIES	\$44.50	\$38.96
NORTH DAKOTA	ALL COUNTIES	\$ 7.40	\$ 6.47
OHIO	ALL COUNTIES	\$29.69	\$25.96

OKLAHOMA	BEAVER	\$14.85	\$12.98
	CIMARRON		
	ROGER MILLS		
	TEXAS		
	LE FLORE	\$22.23	\$19.48
	MCCURTAIN		
OREGON	ALL OTHER COUNTIES	\$ 7.40	\$ 6.17
	HARNEY	\$ 7.40	\$ 6.47
	LAKE		
	MALHEUR		
	BAKER	\$14.85	\$12.98
	CROOK		
	DESCHUTES		
	GILLIAM		
	GRANT		
	JEFFERSON		
	KLAMATH		
	MORROW		
	SHERMAN		
	UMATILLA		
	UNION		
	WILLOWA		
	WASCO		
	WHEELER		
	COOS	\$22.23	\$ 19.48
	CURRY		
	DOUGLAS		
	JACKSON		
	JOSEPHINE		
	BENTON	\$29.69	\$25.96
	CLACKAMAS		
	CLATSOP		
	COLUMBIA		
	HOOD RIVER		
	LANE	\$29.69	\$25.96
	LINCOLN		
	LINN		
	MARION		
	MULTNOMAH		
	POLK		
	TILLAMOOK		
	WASHINGTON		
	YAMHILL		

PENNSYLVANIA	ALL COUNTIES	\$29.69	\$25.96
PUERTO RICO	ALL	\$44.50	\$38.96
RHODE ISLAND	ALL COUNTIES	\$ 7.40	\$ 6.17
SOUTH CAROLINA	ALL COUNTIES	\$44.50	\$38.96
SOUTH DAKOTA	BUTTE	\$22.23	\$19.48
	CUSTER		
	FALL RIVER		
	LAWRENCE		
	MEADE		
	PENNINGTON		
	ALL OTHER COUNTIES	\$ 7.40	\$ 6.47
TENNESSEE	ALL COUNTIES	\$29.69	\$25.96
TEXAS	CULBERSON	\$ 7.40	\$ 6.47
	EL PASO		
	HUDSPETH		
	ALL OTHER COUNTIES	\$44.50	\$38.96
UTAH	BEAVER	\$ 7.40	\$ 6.47
	BOX ELDER		
	CARBON		
	DUCHESNE		
	EMERY		
	GARFIELD		
	GRAND		
	IRON		
	JUAB		
	KANE		
	MILLARD		
	SAN JUAN		
	TOOELE		
	UINTAH		
	WAYNE		
	WASHINGTON	\$14.85	\$12.98
	CACHE	\$22.23	\$19.48
	DAGGETT		
	DAVIS		
	MORGAN		
	PIUTE		
	RICH		

UTAH (Cont'd)	SALT LAKE		
	SANPETE		
	SEVIER		
	SUMMIT		
	UTAH		
	WASATCH		
	WEBER	\$33.23	\$19.38
VERMONT	ALL COUNTIES	\$29.69	\$25.96
VIRGINIA	ALL COUNTIES	\$29.69	\$25.96
WASHINGTON	ADAMS	\$14.85	\$12.98
	ASOTIN		
	BENTON		
	CHELAN		
	COLUMBIA		
	DOUGLAS		
	FRANKLIN		
	GARFIELD		
	GRANT		
	KITTITAS		
	KLICKITAT		
	LINCOLN		
	OKANOGAN		
	SPOKANE		
	WALLA WALLA		
	WHITMAN		
	YAKIMA		
	FERRY	\$22.23	\$19.48
	PEND OREILLE		
	STEVENS		
	CLALLAM	\$29.69	\$25.96
	CLARK		
	COWLITZ		
	GRAYS HARBOR		
	ISLAND	\$29.69	\$25.96
	JEFFERSON		
	KING		
	KITSAP		
	LEWIS		
	MASON		
	PACIFIC		
	PIERCE		
	SAN JUAN		

WASHINGTON (Cont'd)	SKAGIT		
	SKAMANIA		
	SNOHOMISH		
	THURSTON		
	WAHKIAKUM		
	WHATCOM		
WEST VIRGINIA	ALL COUNTIES	\$19.69	\$25.96
WISCONSIN	ALL COUNTIES	\$22.23	\$ 19.48
WYOMING	ALBANY	\$ 7.40	\$ 6.47
	CAMPBELL		
	CARBON		
	CONVERSE		
	FREMONT		
	GOSHEN		
	HOT SPRINGS		
	JOHNSON		
	LARAMIE		
	LINCOLN		
	NATRONA		
	NIOBRARA		
	PLATTE	\$ 7.40	\$ 6.47
	SHERIDAN		
	SUBLETTE		
	SWEETWATER		
	UINTA		
	WASHAKIE		
	BIG HORN	\$22.23	\$19.48
	CROOK		
	PARK		
	TETON		
	WESTON		

United States Department of Agriculture

Agencies, Services and Programs

Link to the web page: <http://www.usda.gov/services.html>

Forest Service Websites

Forest Service Handbook

FSH 2709.11 - Special Uses Handbook

Chapter 30 - Fee Determination

Link to the web page: <http://www.fs.fed.us/im/directives/fsh/2709.11/2709.11.30.rtf>

Forest Service Handbook

FSH 2709.11 - Special **Uses** Handbook

Chapter 40 - Special Uses Administration

Link to the web page: http://www.fs.fed.us/im/directives/fsh/2709.11/id_2709.11-2001-1.doc

Special Uses Home Page

USDA Forest Service

Link to the web page: <http://www.fs.fed.us/recreation/permits/spuse.htm>

Joint Bureau of Land Management and Forest Service Websites

Communication Site Planning Forms

Link to the web page: http://www.fs.fed.us/recreation/permits/commsites/comm_forms.html

Communication Sites

USDI Bureau of Land Management and USDA Forest Service

Link to the web page: <http://www.fs.fed.us/recreation/permits/commsites/index.htm>

United States Department of Commerce

National Telecommunications and Information Administration

Reports, Filings, and Related Material

Link to web page: <http://www.ntia.doc.gov/reports.html>

National Telecommunications and Information Administration

Deployment of Broadband Networks and Advanced Telecommunications

[Docket No. 011109273-1273-01]

Comments Received in this Proceeding

Link to the web page: <http://www.ntia.doc.gov/ntiahome/broadband/index.html>

United States Department of Defense

DefenseLink

Link to the web page: <http://www.defenselink.mil>

Directives and Records Division

Link to the web page: <http://www.dtic.mil/whs/directives/>

Real Property Acquisition, Management And Disposal

Link to the web page for download: <http://www.dtic.mil/whs/directives/corres/html/41656.htm>

United States Department of the Interior

Quick Facts about the Department of Interior

Link to the web page: <http://www.doiu.nbc.gov/orientation/facts.cfm>

Interior Property Management Directives

410 Addition To IPMD

Link to the web page: <http://www.doi.gov/pam/114tab.html>

National Park Service Websites

National Park Service

Director's Order #53: Special Park Uses

Link to the web page: <http://www.nps.gov/refdesk/DOrders/DOrder53.html>

National **Park** Service

Reference Desk – Policies, Guidance, & Manuals

Link to the web page: <http://www.nps.gov/refdesk/policies.html>

National Park Service

Website for the Property Management Program

Link to the web site: <http://165.83.216.66/>

National **Park** Service

Real Property Management Policy and Forms

Link to the web page: http://165.83.216.66/Real_Property_Mgmt.htm

National Park Service

Office of Policy

Link to the web page: <http://165.83.219.72/npspolicy/index.cfm>

United States Fish and Wildlife Service

National Programs/Functions

Link to the web page: <http://info.fws.gov/function.html>

Permits

Link to the web page: <http://ipermits.fnx.gov/>

Refuge Management

Klamath Basin National Wildlife Refuges

Draft Environmental Assessment-Draft Compatibility Determination

Yreka, California to Klamath Falls, Oregon - Fiber Optic Cable Project

Link to the web page: <http://klamathbasinrefuges.fws.gov/mgmt.html>

Bureau of Indian Affairs

The Bureau of Indian Affairs website is temporarily unavailable. however, the Department of Interior website is available, as is the following orientation page.

Bureau of Indian Affairs Orientation

Link to the web page: <http://www.doiu.nbc.gov/orientation/bia2.cfm>

Bureau of Land Management

Lands & Realty

Communication Site Management

Link to the web page: <http://www.blm.gov/nhp/what/lands/realty/management.htm>

Lands & Realty

Rights-of-way

Link to the web page: <http://www.blm.gov/nhp/what/lands/realty/row.htm>

Lands and Realty

Annual Adjustment of Linear Right-of-way (R/W) Rental Rates

Link to the web page: <http://www.blm.gov/nhp/efoia/wo/fv01/ib2001-149.html>

Lands & Realty

Real Estate Appraisal

Link to the web page: <http://www.blm.gov/nhp/what/lands/realty/appraise.htm>

Joint Bureau of Land Management and Forest Service Websites

Communication Site Planning Forms

Link to the web page: http://www.fs.fed.us/recreation/permits/commsites/comm_forms.html

Communication Sites

USDI Bureau of Land Management and USDA Forest Service

Link to the web page: <http://www.fs.fed.us/recreation/permits/commsites/index.htm>

Bureau of Reclamation

Homepage

Link to the web page: <http://www.usbr.gov/main/index.html>

The Reclamation Manual Home Page

Link to the web page: <http://www.usbr.gov/recman/index.html>

Reclamation Manual /Directives and Standards LND 05-01

Real Estate Appraisal

Link to the web page: <http://www.usbr.gov/recman/lnd/lnd05-01.htm#to>

Land Directives and Standards

Link to the web page: http://www.usbr.gov/recman/d_and_s.htm#lnd

Land Use Authorizations (Also available as a pdf file)

Link to the web page: <http://www.usbr.gov/recman/lnd/lnd08-01.htm>

National Oceanic and Atmospheric Administration

National Ocean Service – National Marine Sanctuary System

Bulletin Board with links to the draft report "Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries"

Link to the web page: <http://www.sanctuaries.nos.noaa.gov/news/newsbboard/newsbboard.html>

United States Department of Transportation

Federal Highway Administration (FHWA)

Federal Highway Administration

Link to home page: <http://www.fhwa.dot.gov/>

FHWA Web Sites

Link to web page: <http://www.fhwa.dot.gov/fhwaweb.htm>

FHWA

Subchapter **G** - Engineering And Traffic Operations

Part 645 - Utilities

Subpart A - Utility Relocations, Adjustments, and Reimbursement

Link to the web page: <http://www.fhwa.dot.gov/legregs/directives/fapg/cfr0645a.htm>

Subchapter **G** - Engineering And Traffic Operations

Part 645 - Utilities

Subpart B - Accommodation of Utilities

Link to the web page: <http://www.fhwa.dot.gov/legregs/directives/fapg/cfr0645b.htm>

Utilities Program

Link to the web page: <http://www.fhwa.dot.gov/programadmin/utility.html>

United States Code

Electronic Edition

Link to the web page: <http://www.access.gpo.gov/uscode/uscmain.html>

United States General Accounting Office (GAO)

Link to the web page: <http://www.gao.gov>

United States Government Printing Office (GPO)

GPO Access – Quick links to the following federal sites:

Code of Federal Regulations

Federal Register

Congressional Record

U.S. Code

Congressional Bills

Catalog of U.S. Government Publications

Other Databases

Link to the web page: http://www.access.gpo.gov/su_docs/index.html

ATTACHMENT D - ASSESSMENT OF THE EXISTING POLICIES ON BROADBAND ACCESS AND FEES FOR FEDERAL RIGHTS-OF-WAY

Assessment of the Existing Policies on Broadband Access and Fees for Federal Rights-of-way

Federal Lands and/or Jurisdiction

- o United States Department ~~of~~ Transportation

- § Federal Highway Administration

- o United States Department of Agriculture

- § Forest Service

- § Rural Utilities Service (RUS)

- o United States Department ~~of~~ the Interior

- § Bureau ~~of~~ Land Management

- § Bureau ~~of~~ Reclamation

- o National Park Service

- o Military Facilities

- o National Marine Sanctuaries

State Lands and/or Jurisdiction

- Idaho Transportation Department

Railroads

Burlington Northern Santa Fe Railway

Union Pacific Railroad

Idaho Northern and Pacific

Montana Rail Link

Eastern Idaho Railroad

I. Federal Lands and/or Jurisdiction

A. United States Department of Transportation – Federal Highway Administration

The Federal Highway Administration (FHWA) has developed Freeway Accommodation Policies. The FHWA's Program Guide for Utility Relocations, Adjustment and Accommodations of Federal-Aid Highway Projects, Chapter 2, Utility Accommodation address this issue directly. The following excerpts are from Chapter 2.

It is recognized to be in the public interest for utility facilities to jointly use the right-of-way of public roads and streets when such use does not interfere with primary highway purposes. The opportunity for such joint use avoids the additional cost of acquiring separate right-of-way for the exclusive accommodation of utilities. As a result, the right-of-way of highways, particularly local roads and streets, is used to provide public services to abutting residents as well as to serve conventional highway needs.

Utility facilities, unlike most other fixed objects which may be present within the highway environment, are not owned nor are their operations directly controlled by State or local transportation departments. Because of this, highway authorities have developed policies and practices which govern when and how utilities may use public highway right-of-way. The FHWA utility accommodation regulations have been developed to reflect this situation. A discussion of the development of FHWA policies may be found in the following documents:

- Utility Relocation and Accommodation: A History of Federal Policy Under the Federal-Aid Highway Program, Part II: Utility Accommodation.
- Highway/Utility Guide, Chapter Two, Historical Perspective.

These documents were distributed in 1981 and 1993, respectively. They are important reference sources for those dealing with utility accommodation on Federal-aid projects. Copies are available from the FHWA's Office of Program Administration.

The last major rewrite of the FHWA's overall utility accommodation regulations occurred on May 15, 1985, when a final rule was published in the Federal Register. The only significant changes since then occurred on February 2, 1988, July 5, 1995, and November 22, 2000, when amendments to the regulations were published in the Federal Register.

The 1988 amendments dealt with utility use of freeway right-of-way. It stipulated that each State must decide, as part of its utility accommodation plan, whether or not to allow longitudinal utility installations within the access control limits of freeways and under what circumstances. The FHWA retained the authority to approve each State's freeway utility accommodation plan. The State then operates under its plan and decides whether to permit specific utility installations along freeways.

The 1995 amendments brought the definition of "clear zone" into conformance with the definition in the American Association of State Highway and Transportation Officials

(AASHTO) Roadside Design Guide, and incorporated an amendment conforming the utilities regulations to the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA).

The 2000 amendments emphasized that the most important consideration in determining whether a proposed facility is a utility or not, is how the STD views it under its own State laws and/or regulations, and eliminated a confusing provision to clarify the intent that the utility regulations are not applicable to longitudinal installations of private lines.

Chapter Two further states:

Freeway Accommodation Policies

Prior to FHWA's regulatory change in February 1988 each State, as part of its overall utility accommodation policy, was required to address transverse utility crossings of freeways and how they were to be controlled. Once a State's policy was approved by the FHWA, the State could then approve individual utility requests for transverse freeway crossings without any further referral to the FHWA provided the crossings satisfied the criteria in their approved policy. For longitudinal utility use of freeways, the States were required to adopt a position at least as restrictive as that in the then current AASHTO Policy. Hence, prior to 1988, the only longitudinal installations allowed on freeways were extreme case exceptions under provisions in the AASHTO Policy, and each individual request had to be approved by the FHWA.

Subsequent to the FHWA's 1988 regulatory change, each State was required to update its utility accommodation policy and include its own policy for permitting utility use of freeways, including longitudinal use if such use was to be allowed.

The States had to decide if they wanted longitudinal utility installations on freeways and if so to what extent and under what conditions. Whatever a State decided to do in this regard had to be documented in its utility accommodation policy and submitted to the FHWA Regional Administrator for approval. A State could permit certain utilities and exclude others. And, if a State so chose, it could prohibit any longitudinal utility installations.

All the States are now operating under freeway utility accommodation policies that have been approved by the FHWA. Many States opted to stick with the AASHTO Policy prohibiting longitudinal utility installations, except in special cases under strictly controlled conditions. The States that opted to allow longitudinal installations no longer have to submit individual proposals to the FHWA for approval. It has become their responsibility to assure that proposals are in accord with provisions in their approved utility accommodation policies. Exceptions to these policies, or changes, must be submitted to the FHWA Division Administrator for approval. In substance, **this** places **all** utility freeway installations under **the** same administrative **process that** other utility use proposals have been under since the late 1960s.

In summary, FHWA policy for longitudinal utility installations on freeways is as follows:

- The States may decide if they want to allow longitudinal utility installations on freeways (controlled access highways) and if so to what extent and under what conditions.

- Whatever a State decides to do in this regard must be documented in its utility accommodation policy and approved by the FHWA. Exceptions or changes must be approved by the **FHWA** Division Administrator.
- A State may permit certain utilities and exclude others. If a State so chooses, it can prohibit any longitudinal utility installations.
- Fees charged for utility use are at a State's discretion and may be used as the State sees fit. The FHWA does, however, encourage States to use generated revenues for transportation purposes.

In approving a State's freeway utility accommodation policy, the FHWA must give careful consideration to measures proposed to insure safety of the traveling public, and features to protect the operation and integrity of the highway. Effects on both the present and future use of the freeway must be considered.

The FHWA recognizes that conditions vary. Highway safety matters are not the same on a low volume rural freeway as on a high volume urban one. Considerable latitude may be appropriate on these rural facilities. The nature and type of utility facilities may also differ from area to area. All these variables must be taken into account. It is noted that there is no such thing **as an** absolutely safe utility installation. The construction, operation and maintenance of any utility on or near a major high speed highway cannot be done without some risk. Judgment must be exercised by highway authorities in determining if the **risks** are acceptable and whether **all** reasonable measures have been taken to maximize the safety of the traveling public.

The FHWA regulation presented in § 645.209(c)(2)(v) includes a few details governing specific criteria a State's utility freeway accommodation policy should contain if it plans to allow longitudinal utility use within the access control lines. These are:

- A utility strip should be established along the outer edge of the right-of-way. The FHWA has interpreted this to mean that longitudinal utility installations as a general rule should not be allowed within the median area **of** a freeway. There may, however, be some exceptional circumstances where utility facilities could be safely accommodated in the median. **For** example, for medians of extraordinary width where a utility could be installed well beyond the clear zone of the roadways and where access to the site is from crossroads, a case could well be made that there is minimal impact on the highway and its safe operation. A proposal by a State for a median installation under these circumstances, if considered to be justified, could be handled as an exception under the provisions of § 645.215(d).
- Existing fences should be retained and, except along section of freeways having frontage roads, planned fences should be located at the freeway right-of-way line.
- The State or political subdivision should retain control of the utility strip, including its use by utility facilities.
- Service connections to adjacent properties to provide services to utility consumers should not be permitted from within the utility strip.

Chapter 2 specifically address fiber optic/ wireless telecommunications on Freeway Right-of Way

Fiber Optic/Wireless Telecommunications on Freeway Right-of-Way

Accommodation. Utility vs. Private Line

Many STDs are considering accommodating fiber optic lines and/or wireless telecommunications facilities (towers, monopoles, antennas) on freeway right-of-way in exchange for cash and/or use of the lines or facilities. In so doing, care needs to be exercised to determine whether the facility involved is a "utility facility" or "private line" as defined in 23 CFR 645.207. This distinction is important because it may impact how the transportation department treats the facility and also because the FHWA has different mechanisms for handling its review and approval actions.

When determining whether a facility is a "utility facility" or a "private line" there are two important tests: (1) how the STD views a particular facility under its own State laws and/or regulations, and (2) the definition of "utility facility" in 23 CFR 645.207.

The key item to consider in making this determination, using the above tests, is whether a State considers a particular facility to be a "utility facility" under its own State laws and/or regulations. If the State treats a facility as a utility, and if the facility is producing, transmitting, or distributing any of the commodities outlined in the FHWA definition for the use by or the direct benefit of the public, then the FHWA would also consider it to be a "utility facility" and handle it under its utility regulations.

Hence, if a STD considers a fiber optics line or a wireless telecommunications installation to be a "utility facility," then so too does the FHWA. Conversely, if the State considers them to be "private lines" so too does the FHWA.

An installation considered to be a "utility facility" is probably covered under the State's utility accommodation policy for permitting utility use of freeways and can be handled in accordance with approved procedures. **If** there is any doubt, the transportation department should be encouraged to amend its utility accommodation policy to clearly state its intent relative to accommodating fiber optics and wireless telecommunications.

Wireless telecommunications facilities installed at various intervals along a freeway, if physically located on the highway right-of-way and if relaying transmissions from one to the other, are considered **to** be longitudinal installations. **A** stand-alone wireless facility (tower, monopole, or antenna) is actually neither transverse nor longitudinal, but may nonetheless, if considered to be a "utility facility," be accommodated under provisions in a State's utility accommodation policy for either transverse or longitudinal installations, whichever is the most stringent. The intent is not to be a roadblock, but, as with any utility installation, to be sure careful consideration is given to effects on highway and traffic safety, and also on the operation and aesthetics of the highway,

Median Installations

Fiber optics lines have been installed in freeway medians and roadside clear zones in some States. This practice is not encouraged but may be allowed if there are no feasible alternatives. The official Headquarters policy is to install fiber optics lines in as safe a manner as possible, preferably as close to the control-of-access line as possible.

Location Criteria

When allowed on freeway right-of-way, wireless telecommunications facilities should be located as far from the roadway as possible and/or in inaccessible locations where they are unlikely to be hit by errant vehicles. In addition, the safety impacts of access to construct and service the facilities should be considered.

The Maryland State Highway Administration (MSHA), in coordination with the FHWA, has developed criteria for the placement of wireless facilities on controlled access highways. The goal is to ensure the wireless facilities are placed in locations that preclude them from being roadside hazards, yet still provide safe access for maintenance personnel. They specify that:

- Adequate sight distance must be provided for safe ingress to and egress from the sites.
- The wireless facilities must be located outside the clear zone (where unlikely to be struck) unless shielding already exists.
- **An** adequate pull off area beyond the shoulder must be provided for construction and maintenance purposes.

In addition, the MSHA has set **up** a descending order of preference for siting wireless telecommunications facilities, as follows:

- Priority 1: Vehicle access to the site can be obtained from outside the through-roadway and connecting ramps (e.g., access from frontage roads or cross roads).
- Priority 2: Within the interchange, vehicle access can be obtained from the right hand side of the diagonal ramps.
- Priority 3: Within the interchange, vehicle access can be obtained from the left hand side of the diagonal ramps.
- Priority 4: Vehicle access from the outside shoulder (right hand side) of the mainline.
- Priority 5: Vehicle access from the inside shoulder (left hand side of the mainline)

Justification must be provided for descending to any level below Priority 1. FHWA concurrence is required for any installation within a loop ramp, within any freeway weave area less than 3/4 mile in length, or requiring new shielding.

FCC Considerations

A number of States have permitted access to limited access highway right-of-way for fiber optic and wireless telecommunications installations. Several of these installations have been public-private partnerships with the telecommunications industry, which are generally referred to as shared resource agreements. In December 1999, the Federal Communications Commission (FCC) issued an opinion in a Minnesota Department of Transportation case involving such a partnership that defined the FCC's interpretation of the Telecommunications Act of **1996** (TCA) and its application to the Minnesota agreement.

As a result of the FCC's opinion, the FHWA engaged in a discussion with the FCC to clarify how these partnerships and other similar telecommunications installations should be conducted to avoid conflict with the TCA and be consistent with the FHWA's requirements for highway safety and right-of-way management. These discussions culminated in an approach that considers both the requirements of the transportation industry and its concern for highway safety, and the FCC's concern with implementation of the TCA. This approach was documented in two letters -- (1) a letter from the FHWA to the FCC defining elements pertaining to access to freeway ROW, and (2) a letter to the FHWA from the FCC defining competitive elements based upon the access restrictions defined by the FHWA.

The FHWA/FCC discussions are documented in the Executive Director's December 22, 2000, memorandum to Division Administrators setting forth guidance to assist STDs in the execution of shared resource agreements, particularly relative to access and competitive issues. Attached to this memorandum is a document entitled, "Background Discussion on Guidance: Telecommunications Installations, Limited Access Highway Right-of-Way," which presents a detailed discussion of the FCC's ruling on the Minnesota case, and the rationale for these guidelines which have been developed in cooperation with the FCC.

Guidance on Access Issues

If a State chooses to allow longitudinal access for fiber optic facilities installation on its freeway right-of-way, it is recommended the following guidelines apply to that installation:

1. In these guidelines, it is understood that the State retains the right and responsibility to manage its freeway ROW. Reasonable, nondiscriminatory time, place, and manner restrictions, including but not limited to traditional permitting conditions, may be placed on the design, installation, operation, and maintenance of fiber optic facilities.
2. **All** construction should be done in that portion of the ROW that is located furthest from the traveled roadway to the degree feasible, and should be accomplished in accordance with the Manual on Uniform Traffic Control Devices, per 73 CFR 655.603.
3. If all construction vehicles, equipment, and personnel can be located outside the clear zone on the freeway, as defined in the AASHTO Roadside Design Guide and adopted by FHWA in Federal Aid Policy Guide, Par. 16(a)(3) NS 23 C.F.R. 625, except for ingress and egress, the State **may use** the freeway ROW for fiber optic facilities installation as frequently as reasonably

necessary to satisfy the requirements of the State, and the needs of the telecommunications providers. A State may limit construction so that there is no more than one installation project underway at any given time on any major segment of the freeway.

4. If construction vehicles, equipment, and personnel cannot be located out of the freeway clear zone, then the State may restrict fiber optic facilities installation to only one time on that area of the freeway where construction would occur within the clear zone. No further installation needs to be allowed on that segment until such time as required by the end of the useful life of the fiber optic facilities, or if the existing capacity is exhausted or existing conduit is full. Existing fiber and conduit capacity will be deemed exhausted whenever the State and the contractor mutually determine that a bona-fide request for dark fiber, conduit space, or a bona-fide request for any other transmission facilities or service cannot be granted. Additional installation at this time will be subject to reasonable non-discriminatory State requirements, e.g., per #1 above.
5. A State may restrict the location of **all** the above ground equipment to the edge, or off of the ROW to allow access to that equipment for maintenance from service roads or other non-freeway access if feasible, as determined by the State. Such restrictions should be nondiscriminatory.

Guidance on Competitive Issues

To assist States in meeting the intent of the TCA with regard to maintaining a competitively neutral position in the process of developing and implementing a shared resource or other telecommunications installations project, the FCC suggests the following principles be followed in the development of these projects. These principles should be considered whenever a State decides to limit further installations of fiber optic facilities on its ROW, whether in or out of the clear zone.

1. The contractor should be selected through an open, fair, nondiscriminatory, competitive process.
2. Having selected a contractor, other interested third-party telecommunications companies should be allowed the opportunity to have their fiber optic facilities installed in conjunction with any installation of fiber optic facilities by the contractor. The State may make the contractor the sole party responsible for all installation work done at such times, and require that other third party telecommunications companies contract with that contractor for installation of their fiber optic facilities when their facilities are installed in conjunction with those of the contractor. In such cases, the contractor's charges, terms and conditions for installation should be fair, reasonable, and nondiscriminatory and may include a reasonable profit. The State should give potentially interested third parties reasonable notice of the anticipated or planned opening of the right-of-way. The notice period should reflect the time reasonably required by third parties to develop business plans and obtain financing. Notice can be accomplished through publication and dissemination of a construction schedule for the project. Such publication and dissemination should be reasonably calculated to provide potentially interested third parties with actual notice of the schedule.

- 3 The contractor should install spare fiber and empty conduit, adequate to accommodate reasonably anticipated future demand, whenever fiber optic facilities cannot be installed outside the clear zone. Each section of fiber/conduit within the clear zone should have connection points (manhole or cabinets) at each end outside the clear zone where third parties can access the conduit or interconnect with facilities in the conduit at their option. All rates, terms and conditions for interconnection and/or use of space in the conduit should be fair, reasonable, and nondiscriminatory and may include a reasonable **profit**.
- 4 The contractor should be required to sell fiber on an "Irrevocable Right of Use" (IRU) basis at rates and subject to terms and conditions that are just, reasonable, and nondiscriminatory. The contractor's charges for such facilities may include a reasonable profit.
5. The contractor should be required to offer facilities and services for resale at rates and subject to terms and conditions that are just, reasonable, and nondiscriminatory and may include a reasonable profit.
- 6 The agreement with the contractor should require that the contractor comply with the terms defined above, and give third parties the right to challenge the contractor's compliance with the appropriate elements of these terms dealing with third party access before an independent entity which does not benefit directly from the arrangement with the contractor. The independent entity should have the authority to order the contractor to comply with these terms. A State public utilities commission, or independent arbitrator, might serve in this capacity. In this regard, prompt resolution of such issues can be critically important to the development of competition.
- 7 It is substantially preferable that the contractor be a wholesaler of telecommunication in order to minimize competitive concerns, as opposed to being a retail telecommunications services and facilities provider either directly or through an affiliated entity. This reduces the potential for anti-competitive pricing that could violate section 253 of the TCA. However, if the contractor does provide retail telecommunications service directly or through an affiliated entity, all rates, terms and conditions for its retail service should be fair, reasonable, and nondiscriminatory.

Keep in mind that the above information is only guidance. The STDs don't have to follow it. The Division Offices don't have to abide by it. It is only guidance. However, if STDs opt to install fiber optics or wireless telecommunications towers on limited access highways in accordance with this guidance, they should have nothing to fear from the FCC. This doesn't mean the STDs can't do more. They can and the FHWA can approve what they do. And it may be all right. But there will be no assurances that the FCC will not take exception to what has been done and initiate actions to force STDs to make unwanted policy changes.

Longitudinal Telecommunication Lines On Freeways For A States Own Use

4 State may install longitudinal telecommunication lines for its own **use** within the access control limits of freeways in the State, if appropriate provisions have been included in an approved utility accommodation plan. For these purposes the installation is considered to be a "utility facility" as opposed to a "private line" as defined in 23 CFR 645.207.

A State may lease longitudinal telecommunication lines, installed for its own use within the access control limits of freeways in the State, to other State agencies or to local governmental agencies. This is still considered to be "for the use of a State or local governmental unit."

Longitudinal utility facilities within the access control limits of freeways must directly or indirectly serve the public. Hence, a State could lease such telecommunication lines to a "utility" if such use was in accordance with their approved utility accommodation policy, but could not lease such telecommunication lines to "private" users without special FHWA Headquarters approval based upon a public interest finding in accordance with 23 CFR 1.23.

Fees Charged for Telecommunications Use of Highway Right-of-way

The Telecommunications Act of 1996 (Public Law 104-104) and guidance on page 44 of this publication indicate STDs may, at their discretion, charge fees for longitudinal utility use of highway right-of-way. But, there is no mention in Federal law, regulation, or policy as to how these fees are to be used.

It has been the FHWA's policy for many years to allow States to charge fees for utility use of highway right-of-way if they desire, and to allow them to use the proceeds as they see fit. In the past, fees charged for utility use were generally just enough to cover the cost of processing permits. Now, with the advent of fiber optics and wireless telecommunications, opportunities exist for the States to make substantial profits. In such cases, the FHWA has informally encouraged the States to use such revenues for transportation purposes.

The above discussion has to do with utility use of highway right-of-way. It is important, however, to distinguish between a "utility facility" and a "private line," as discussed previously beginning on page 38, because they are handled differently and have different requirements for the use of fees.

Private lines can be installed on highway right-of-way. However, it is important to understand that longitudinal private line installations are to be handled under the provisions of 23 CFR 1.23(c); whereas, longitudinal utility installations are to be handled under the provisions of 23 CFR 645, subpart B.

As part of a major update of the utility regulations in 1985, the FHWA wanted to establish procedures for handling both the accommodation of utilities and the use of highway right-of-way by private lines. It was decided that private line crossings could be handled under the utility regulations contained in 23 CFR 645 subpart B, but that private line longitudinal use could not.

Private line longitudinal use was considered to be clearly beyond the public interest finding in 23 CFR 645.205(a) that allowed utilities to occupy highway right-of-way. It was therefore decided that private line longitudinal use should be handled on a case-by-case basis under the provisions of 23 CFR 1.23(c), which is the agency's authority to allow non-highway use of highway right-of-way. This decision only addressed the approval mechanism for private line use of highway right-of-way. The matter of fees did not come into play.

Even so, 23 CFR 1.23(c) opens the door for the use of the airspace law and regulation in 23 U.S.C. 156 and 23 CFR 713 subpart B, respectively, and they in turn set forth income requirements for longitudinal private line use of highway right-of-way. It is important to note that utility use is clearly exempted from these requirements. The airspace law and regulation also requires that fair market value be charged for the use of airspace right-of-way and that any revenues obtained be used for projects eligible under title 23, U.S.C. As mentioned above, utility use of airspace right-of-way is exempted from these requirements, but private line use is not.

To summarize:

- STDs may charge fees at their discretion for longitudinal utility use of highway right-of-way, but there is no mention in Federal law, regulation, or policy as to how these fees are to be used. The FHWA encourages STDs to use generated revenues for transportation purposes.
- Private line longitudinal use of highway right-of-way is covered by 23 U.S.C. 156. STDs are required to charge fees for such use based on fair market value and to use such fees for title 23 purposes.
- Private line crossings of highways should be handled like utility crossings under the provisions of 23 CFR 645 subpart B. 23 U.S.C. 156 should not be applied in these situations.

Facilities Similar to Utilities

In 1997, the Office of Chief Counsel provided written legal advice to the Office of Engineering concerning environmental requirements that are triggered by the accommodation of telecommunications towers on Federal-aid highways. Chief Counsel noted that there **are two** different approaches to the siting of "utility facilities" and "private lines" on Federal-aid highway right-of-way, with different duties for environmental compliance, and suggested that FHWA consider revising its regulations to include facilities similar to utilities.

Facilities similar to utilities might include fiber optics, wireless telecommunications towers, or possibly other facilities that are considered by the FHWA to be included in the definition of "utility facility" in 23 CFR 645 and are considered to be utilities by many, but not all, of the States.

Presently, utilities may be accommodated on highway right-of-way under provisions in the utility regulations. Non-utilities may also be accommodated, but under provisions in another regulation, 23 CFR 1.23(c). The proposed change to the utility regulations would allow "similar facilities," whether considered by an individual State to be "utilities" or not, to be accommodated under provisions contained in the utility regulations. This would provide uniformity by avoiding wireless telecommunications towers and fiber optics from being accommodated under one FHWA procedure in one State and a different FHWA procedure in another State.

After much consideration it was decided not to make this change. While it would have provided uniformity and simplicity, it would have conflicted with the FHWA's long-standing policy that the most important consideration in determining whether a proposed installation is a utility **or**

not is how the STD views it under its own State laws and/or regulations. There was also the appearance that accommodating non-utilities under the utility regulations might interfere with other requirements currently in effect **for** accommodating non-utilities. particularly in regard to fair market value. use of revenues for title 23 purposes. and the environment.

Even so. there may be times when it would be expedient and prudent to consider a facility to be "similar" to a utility and to accommodate it under the utility regulations. This should only be done on a case-by-case basis and the reasons should be well documented. Particular attention should be given to environmental, right-of-way, and other sensitive issues to assure they are adequately addressed.

The FHWA's Program Guide, Utility Adjustments and Accommodation on Federal-Aid Highway Projects. CHAPTER 2. UTILITY ACCOMMODATION is available on the FHWA's internet site at the following address: <http://www.fhwa.dot.gov/reports/utilguid/utilchp2.htm>.

Engineering requirements are found in 23 CFR 645 Part **B**, Subchapter **G** – Engineering and Traffic Operations, Part 645 – Utilities. Subpart B – Accommodation of Utilities. Along with general requirements and state transportation department accommodation policies among other sections, there is section 615.213 - Use and occupancy agreements (permits). This section states:

Sec. 645.213 Use and occupancy agreements (permits)

The written arrangements, generally in the form of use and occupancy agreements setting forth the terms under which the utility is to cross **or** otherwise occupy the highway right-of-way, must include or incorporate by reference:

- (a) The transportation department standards for accommodating utilities. Since **all** of the standards will not be applicable **to** each individual utility installation, the use and occupancy agreement must, as a minimum, describe the requirements for location, construction, protection of traffic, maintenance, access restriction, and any special conditions applicable to each installation.
- (b) A general description of the size, type, nature, and extent of the utility facilities being located within the highway right-of-way.
- (c) Adequate drawings or sketches showing the existing and/or proposed location of the utility facilities within the highway right-of-way with respect to the existing and/or planned highway improvements, the traveled way, the right-of-way lines and, where applicable, the control of access lines and approved access points.
- (d) The extent of liability and responsibilities associated with future adjustment of the utilities to accommodate highway improvements.

(e) The action to be taken in case of noncompliance with the transportation department's requirements.

(f) Other provisions as deemed necessary to comply with laws and regulations.

(The information collection requirements in this section were approved under control number 2 125-0522)

In summary, the Federal Highway Administration has jurisdiction over right-of-way issues for federal highways, and they have delegated that jurisdiction to the states. Each state would have their own particular rules and regulations for right-of-way leases. The Idaho Department of Transportation rules and regulations for highways in the state of Idaho are elsewhere in this report.

B. United States Department of Agriculture

1. Forest Service

The US Forest Service has numerous sources of regulation. Not only does the Forest Service have rules and regulations covering this topic at the national level, each of the Regions have their own rules and regulations that apply to the various National Forests in their jurisdiction. Then, each particular National Forest can have their own set of rules and regulations that apply only to those Forest Service lands. Idaho is covered by 2 regions, Region 1, the Northern Region, with headquarters in Missoula, Montana; and at Region 4, the Intermountain Region, with headquarters in Ogden, Utah. In Idaho there are 2 separate National Forests.

Notwithstanding the various sources for regulation, in general, Right-of-Ways on Forest Service land are priced at fair market value. Forest Service Manual 2700 – Special Uses Management provides regulations and guidelines for telecommunication Right-of-Ways. Section 2728 of this manual covers Communications. Interim directive No. 2720-2001-1, which was effective on September 5, 2001 and expires on March 5, 2003 establishes a new code for fiber optic cable uses. Detailed direction on the processing of applications, issuance of authorizations, and establishment of rental fees for these uses on National Forest System lands is provided in section 48.23 of Forest Service Handbook 2709.11, the Special Uses Handbook. Section 48.23c states:

48.23c - Processing of Applications and Administration of Authorizations for Fiber Optic Cable Uses

Fiber optic cable project proponents often find it economically beneficial to design and construct a fiber optic cable project with excess capacity (fiber, cables, conduits, or other equipment) beyond their needs, which can be sold or leased to other telecommunications service providers. Thus, a single fiber optic cable project can have a variety of owners and separate telecommunications service providers. Each additional telecommunications service provider must have its own authorization from the Forest Service or be accommodated in a single authorization through that authorization's subleasing provisions.

The owner of the authorized fiber optic cable(s) or the telecommunications service providers that lease excess cable capacity from the owner may sublease to a customer for that customer's own internal communications needs. A customer does not sell or provide communications service to others and, therefore, would not need a separate authorization, nor would that customer's use be specifically provided for in the authorization.

1. New Authorizations Involving Capacity Excess to Applicant's Needs. Issue a single authorization on Form FS-27004. Do not issue separate authorizations to additional telecommunications service providers, except as provided in the following. Determine a single rental fee for all users, based on the current linear right-of-way schedule (sec. **36.4**). Each authorization shall contain the following provisions:

- a. A provision allowing subleasing and a requirement that the holder is liable and responsible for compliance with all the terms and conditions of the authorization, including compliance with the terms and conditions by any additional users (ex. 01).
- b. A requirement that the holder notify the Forest Service of any change in the future ownership status of the fiber optic cable project and in the subleasing of excess capacity (ex. 02).
- c. A right-of-way width that adequately accommodates the project, but not less than 10 feet in width.
- d. A maximum term of 10 years.
- e. A provision informing the authorization holder that the Forest Service would provide the holder appropriate advance notification if the agency adjusts the rental fees and/or changes regulations or administrative policies applicable to fiber optic cable uses (ex. **03**).
- f. A provision requiring annual data submission to the authorized officer (ex. 04).

When requested by a proponent or holder, the Forest Service may issue separate authorizations to each individual owner or telecommunications service provider involved in the project to accommodate the needs of that specific business arrangement. When one project has two or more authorizations associated with it, rent shall be assessed to each authorization holder based on the current linear right-of-way schedule (sec. **36.1** of this Handbook).

2. New Authorizations Not Involving Excess Capacity. Issue a single authorization on Form FS-2700-4 without subleasing provisions. The rental fee will be determined based on the current linear right-of-way schedule (sec. **36.4**). Each authorization shall contain the following provisions:

- a. A right-of-way width that adequately accommodates the project, but not less than 10 feet in width.
- b. A maximum term of 10 years.
- c. A provision informing the authorization holder that the Forest Service holder would provide the holder appropriate advance notification if the agency adjusts the rental fees

and/or changes regulations and administrative policies applicable to fiber optic cable uses (ex. 03).

3. Installation Within an Existing Transportation or Utility Right-of-way. A new authorization is required when a fiber optic use is proposed for installation within an existing transportation or utility right-of-way, or within an existing authorized facility where the primary purpose is something other than fiber optic telecommunications. A new authorization is not needed if the existing authorization provides for fiber optic cable use or if all the fiber optic cables installed are used solely to support the operations of the current authorized use. New fiber optic authorizations issued within an existing transportation or utility right-of-way, or on existing authorized facilities, shall be issued in accordance with the provisions outlined in the preceding paragraphs 1 (new authorizations involving excess capacity) and 2 (new authorizations not involving excess capacity), including minimum width and maximum term of the authorization and only after a determination is made that the fiber optic facility will not be inconsistent with the rights and privileges granted to the holder of the authorization for the existing use and occupancy.

48.23c - Exhibit 01

Subleasing Provision for Fiber Optic Cable Special Use Authorizations

Include the following provision in all authorizations for fiber optic facilities that have capacity in excess of the holder's needs.

Subleasing

The holder of this authorization may sublease, sell, or purchase back individual fibers, conduit space, and space within regeneration or optic amplification station sites authorized by the original authorization to telecommunications service providers and customers without further approval from the Forest Service.

The holder may utilize any empty conduit authorized by the original authorization for its own future expansion without additional approval from the Forest Service.

The holder may charge each customer or telecommunications service provider a reasonable rent without discrimination for the use and occupancy of the facilities and services provided. The holder must impose no unreasonable restrictions nor any restriction restraining competition or trade practices. The holder waives all defenses of laches, or estoppel against the United States and must at all times keep the title of the United States to the property free and clear of all liens and encumbrances.

Subleasing includes any change in ownership of any portion of the authorized use, or the subleasing of space to additional telecommunication service providers within the right-of-way during a portion of the authorization term. These additional telecommunication

service providers will not be required to obtain a separate permit for their use. Occupancy or renting of space does not constitute an assignment under this permit. The holder is liable and responsible for compliance with all terms and conditions of the authorization, including compliance with the terms and conditions by any telecommunication service providers or customers.

48.23c - Exhibit 02

Notification Requirement Provision for Fiber Optic Cable Special Use Authorizations

Include the following provision in all authorizations for fiber optic facilities that allow for subleasing of fiber, innerduct, or cable.

Notification Requirement,

The holder shall notify the authorized officer in writing of the date whenever:

1. A lease/purchase agreement has been signed for use of empty conduit space to separate telecommunications service providers, or

2. A change in the future ownership status of the project or segment of the project occurs.

Written notification by the holder to the authorized officer must occur within thirty (30) days of the actual dates specified in (1) or (2) above.

48.23c - Exhibit 03

Rent Determination Provision for Fiber Optic Cable Special Use Authorizations

Include the following provision in all authorizations for fiber optic use.

Rent Determination

The holder must pay in advance an annual rent determined by the authorized officer in accordance with current linear right-of-way rent schedule, as adjusted annually (FSH 2709.11, sec. 36.41).

At this time, no additional rent will be assessed to the holder for any telecommunications service providers or customers located within the subject project or facility.

This authorization is subject to any new rent schedule or other suitable method for determining rent for linear right-of-way facilities, including fiber optic uses, in accordance with any new requirements applicable to such uses on National Forest System lands, such as policies or regulations that the Forest Service may adopt. The Forest

Service will provide the authorization holder appropriate advance notification of any such changes in rental fees and, where applicable, the opportunity to comment on such changes.

Forest Service Handbook 2709.11 – Special Uses Handbook. Chapter 36. Fee Determination states (of course, there are exceptions):

36.41 - Determination of Fee

Calculate the annual fee by using the fee schedule in exhibit 02 (which is issued separately as an interim directive) that provides rental rates by State, county, and type of linear right-of-way use. The annual fee is the rental rate times the number of acres. Round the acres to the nearest hundredth and round the total fee to the nearest dollar. For example, the 1991 fee for a municipal water canal located on 21.392 acres of National Forest System lands in Hood River County, Oregon, is calculated as follows:

$$\$23.55 \text{ per acre per year} \times 21.39 \text{ acres} = \$558.84 \text{ (rounded to } \$559\text{)}.$$

1. Annual Adjustments. The per-acre rental fees in the fee schedule are adjusted annually by multiplying the current year per-acre rental fee by the annual change (second quarter to second quarter) in the implicit price deflator-gross national product (IPD-GNP) index, exhibit 01 (which is issued separately as an interim directive), as published in the Survey of Current Business of the U.S. Department of Commerce, Bureau of Economic Analysis. The Washington Office Director of Lands is responsible for making annual updates to the IPD-GNP index and fee schedule.

2. Minimum Fee. Charge the Regional or Forest minimum fee when the calculated annual fee from the fee schedule is less than the minimum fee established by the Regional Forester or Forest Supervisor. For example, when the Regional Forester sets \$50 as the Regional minimum fee for a special-use permit, charge the minimum \$50 rather than the \$20 fee calculated from the linear right-of-way fee schedule.

3. Lump-sum Fee. Calculate the annual fee amount from the fee schedule and multiply the product by the number of years for which fees are collected (sec. 32.21). For example, the 1991 annual fee amount for a water line is \$60 and the special use permit provides for fee payments for 5-year periods. The fee amount would be \$300 (\$60 x 5 years = \$300). The fee would be collected again in 1996 and would be calculated by using the adjusted values in 1996 for the next 5-year period.

The Forest Service and the Bureau of Land Management have coordinated a website, "Communication Site Planning Forms." It is located at the following internet address:
<http://www.fs.fed.us/recreation/permits/commsites/comm-forms.html>

The Forest Service has a brochure for the special use permit, "Obtaining a Special-Use Authorization with the Forest Service." This helpful brochure can be found at

<http://www.fs.fed.us/recreation/permits/broch.htm> and is reproduced here. A good starting place **for** the application process would be with the local National Forest Service office.

Obtaining a Special-Use Authorization with the Forest Service
The Application Process
U.S. Department of Agriculture Forest Service
Forest Service Special-Uses Program

The Forest Service manages 191.6 million acres of national forests and grasslands that comprise the National Forest System (NFS). Today, our growing population and mobile society have created a demand for a variety of uses of these federal lands. Often these diverse needs require specific approval. The Forest Service provides services that support our national policy and federal land laws. The Agency's special-uses program authorizes uses on NFS land that provide a benefit to the general public and protect public and natural resources values. Currently there are over 72,000 authorizations on the national forests and grasslands for 200 types of uses.

Each year, the Forest Service receives thousands of individual and business applications for authorization **for** use of NFS land for such activities as water transmission, agriculture, outfitting and guiding, recreation, telecommunication, research, photography and video productions, and granting road and utility rights-of-ways. The Forest Service carefully reviews each application to determine how the request affects the public's use of NFS land. Normally, NFS land is not made available if the overall needs of the individual or business can be met on nonfederal lands.

·What are special-use authorizations?

A special-use authorization is a legal document such as a permit, lease, **or** easement, which allows occupancy, use, rights, or privileges of NFS land. The authorization is granted for a specific use of the land for a specific period of time.

·When do I need an authorization?

1. If you will need to occupy, use, or build on NFS land for personal or business purposes, whether the duration is temporary or long term.

7. If there is a fee being charged or if income is derived from the use.

3. **If** an activity on NFS land involves individuals or organization with **75** or more participants or spectators.

Application Process

·Is my proposal appropriate?

1. Your request must be consistent with federal, state, and local laws, regulations, and special orders that apply to the national forests.

2. Your request must be consistent with the Forest Plan that established standards and guidelines for management of the land where the activity will take place. **A** copy of the forest plan is available at your local Forest Service office and in many libraries.
3. Your request must not endanger public health or safety
4. Your request must not require exclusive or perpetual use or occupancy.
5. Your request cannot conflict or interfere with administrative use by the Forest Service, other authorized existing uses, or uses of adjacent nonfederal lands.
6. The applicant must not owe any fees to the Forest Service from a prior or existing special-use authorization.
7. No gambling or providing of sexually oriented commercial services can be authorized on NFS land, even if permitted under state law.
8. No military or paramilitary training or exercises can be authorized on NFS land, unless it is federally funded.
9. No disposal of solid waste or storage or disposal of radioactive or other hazardous substances can be authorized on NFS land.

·How do I apply?

1. Contact a Forest Service office and request an application. You will receive **an** application, depending upon your requested use. Application information is also available on the special uses home page at <http://www.fs.fed.us/recreation/permits>
2. Prior to submitting the proposal, you are required to arrange a preapplication meeting at the local Forest Service office where the use is being requested. A staff member will discuss your proposal, potential land use conflicts, application procedures and qualifications, probable time frames, fees and bonding requirements, additional coordination with other agencies, environmental reports, and field reviews.
3. Most commercial uses require additional information with the application. You may need business plans, operating plans, liability insurance, licenses/registrations, or other documents. A commercial use is when an applicant intends to make use of NFS lands for business or financial gain.
4. Complete and submit the application form, including supporting documents, to the local Forest Service office. **An** incomplete proposal could delay the processing.